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Why has there been no ‘rights revolution’ in Germany?

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Similarly to the United States, from the mid 1950’s Germany saw changes in the direction where in everyday judicial proceedings judges based their judgements, in addition to simple statutory law, directly on the constitution. A stronger version of this was supported at that time also by the highest labour court president Hans Nipperdey, who proclaimed the direct effect of fundamental constitutional rights. In view of this, striking down the relevant statutory provisions judges could decide the cases presented to them. After heated debate, eventually the influence of fundamental constitutional rights was not able to gain ground in adjudication to such an extent, but indirectly, when the open aspects of statutory provisions had to be interpreted by judges in the light of fundamental rights, the building of adjudication on fundamental rights was attained. In the other countries of the world, where constitutional review had been institutionalised, the inclusion of fundamental rights into the adjudication was not followed in any way for a long time, and only in recent years have there been signs of it being followed in certain countries. (E.g., in Canada since the 1980’s, following the example of the US, in Italy following the pattern applied in Germany, shifts have taken place in this direction.) Thus it is interesting to compare the different features of the German and American fundamental rights jurisdiction that go back almost to the middle of the last century. In Germany this development has scarcely affected the total structure of law and the process of political decisions, and the layer of fundamental rights have mostly just supplemented the internal structure of law and politics. Contrary to that, in the United States it has exerted a cathartic effect both on internal elements of the legal system and the operation of the law, as well as on the institutions involved in the political decision making. In the latter, fundamental rights adjudication has led to a social revolution, and the changes that have taken place in society, politics and law are summed up under the denomination ‘rights revolution’ in the relevant literature. In Germany, however, it has produced no more than shifts in emphases, but no ‘rights revolution’ can be referred to here.

What can be said in explanation of the absolutely different course of the process in the two countries?

The first point that should be considered is how ‘rights revolution’ evolved in the United States, the next thing to be examined is what obstructed the progress of similar processes evolving in each structural element of law and politics.

1. The development of the rights revolution in the United States

As regards the key elements in the development, the following phases and progresses can be discerned in the course of the rights revolution in the US.

1. The commencement of the process was represented by the appointment of Earl Warren, a former member state, Republican governor, Justice of the Federal Supreme Court in 1953, which appointment was later called by President Eisenhower the greatest error ever made in his lifetime. Contrary to the will of the majority in the legislature and the public opinion, Warren launched Supreme Court adjudication striving to refashion social conditions relying on constitutional fundamental rights. In the first years, due to the resistance of Felix Frankfurther and some justices forming a group around him, it was not able to evolve, but after Frankfurther retired in 1962, there was no more obstacles in its way. The strategy striving to restructure social conditions through adjudication based on fundamental rights was supported by a firm majority in the US Supreme Court throughout the 1960’s. The changes in the internal relations of the highest judicial forum themselves, however, would not have been able to create the rights revolution; numerous additional circumstances and simultaneous changes were also required.
2. The key element in this was that the community of jurists in the United States was radically extended and subsequently fell apart politically. With the vast extension of university education in the 1950’s and 60’s, the number of college and university students multiplied in general (similarly to the radical extension that took place in this field in most of the countries in Western Europe), and the same extension took place at law faculties too. The governments succeeding each other acted uniformly as regards the fact that large numbers of students from

poorer layers of society, specifically from black and Spanish minorities, were to be admitted to universities with the government's assistance. The communities of the American legal profession, formerly homogenous socially and politically, were, in the course of this radical extension, more and more disintegrated into political camps relentlessly opposing each other. The activists of 'The Black Panthers' acquired law degrees just as the children of conservative white farmers, or other children of poor minorities from the ghettos of American cities, and by the end of the 1960's multitudes of movement lawyers had been trained among the walls of law faculties. Given the presence of such jurist communities, the earlier neutral administration of justice became, in several respects, the terrain of political movement lawyers.

3. The falling apart of the legal profession in itself could, however, not have produced the rights revolution, if the socialisation of lawyers at the universities had been able to resist politicisation, and university law education had remained within the framework of the earlier neutral law dogmatics/case law. That was what began to disintegrate at the end of the 1960's, and the formerly reigning procedural law concept was more and more forced into the background by the 'moral philosophy' law concept shaping fundamental rights activism into a theory. The focal point of law was shifted to the level of constitutional rights, and the regulation of each branch of law was gradually transferred around the fundamental rights. These were, however, due to the abstract nature of fundamental rights, and the directions of fundamental rights contradicting each other, allowed freer judicial arguments and more discretionary jurisprudence corroboration. Family law, labour law, financial law, criminal law, procedural laws began to appear more and more as "derived" constitutional law branches, and in them overall ideological-political argumentation gained ground vis-á-vis the former neutral/law dogmatics viewpoint.

However, not only in terms of the overall law concept did this radical shift take place in the United States, faculty members were basically transformed too. Having become enormously huge, American university education required the multiple of earlier academics from the 1960's, and they were recruited mostly from lawyers' communities politically opposing each other. The black movement activists, the radical feminists, the homosexual/lesbian movement lawyers, etc. became the members of law faculties the same way as others coming from the legal profession

socially/politically more heterogeneous. What is more, it can be said that it was just the members of law faculties that fulfilled the role of catalysts in organising the human rights/political movements of specific social groups. To a different degree at various universities, education at law faculties became to a certain extent the key channel for legal movements and political education at that time in the United States.

This was supplemented by the transformation of the conceptual material of each field of law from the aspect of movement lawyers. For example, the conceptual reinterpretation of family law, the creation of new concepts by the university jurists of radical feminists, or from another aspect the same was attained by the lawyers of homosexual/lesbian movements. Numerous fields of law, the concepts of labour law were transformed by the leftist/Marxist 'Crits', and in almost each branch of law an ideologically/politically competing conceptual material evolved. And most of the students studying at law faculties had the option to elect the set of movement law concepts in line with their origin, family background from the offer of political groups competing with each other at the faculties.

In summary, it can be said in this respect that legal education slipped from the neutral law dogmatics case law education to teaching the set of concepts of cause lawyering while training a steadily widening range of young lawyers.

4. These processes were supplemented, and made possible, by the changed method of social/political fight from the beginning of the 1960's in the United States. At that time the political organisations were aimed at the legislation of the Congress and the member states gradually changed direction, and following suit, induced by the adjudication of the Warren tribunal striving to refashion society, political movements started to build their organisations towards the court room through setting up their legal departments. In addition to the Supreme Court, the Democratic governments of the 60's attempted to appoint judges to all federal courts who showed responsiveness to the rights revolution, and instead of simple legal material they built their judgments directly on fundamental constitutional rights, and were willing to concede the increasingly wider fundamental rights definitions of activist lawyers. E.g., in the event of employment contracts wages payable in the future were included in the

concept of property, and thus it was possible to turn the majority of labour law proceedings into constitutional proceedings based on the protection of property under the constitution where an employee was dismissed from his/her job. Also, there were arguments which claimed that a worker's sole property was his/her working power, subsequently, in the event that a worker became unemployed, he/she was deprived of his/her property, therefore it represented that his/her fundamental constitutional rights were infringed in the first place. And the spreading of cause lawyering induced the Democratic presidential administrations of the 60's to elect federal justices more and more on the grounds of their earlier movement lawyer's career, and as a counter effect of which the Republican presidential administrations in the 70's tried to fill vacancies with emphatically conservatively biased university lawyers. Subsequently, after the university movement lawyer training, then the militant cause lawyering the federal judiciary was completed with jurists having such experience, or their political opponents. (At member state courts there were also shifts in this direction but this change took place mostly at the federal level in line with the fact that the 'rights revolution' was based on the fundamental rights provisions of the federal constitution.

In the beginning only a few large organisations were active in the forefront of cause lawyering. Thus, the establishment of ACLU, the American Civil Liberties Union constituted the commencement but as fundamental rights jurisdiction spread in everyday adjudication from the 1960's, gradually more and more new social groups and political organisations moved towards the direction where they established legal departments. Thus, after the cause lawyering organisations of the feminists, the gays, the black, the homeless, the widest range of minorities, including the blind, national minorities, etc., followed suit. Having anyway no other option owing to the oversized legal education, graduates found jobs at the thousands of movement lawyer's offices, and tried to live on public funds granted to minorities and the state budget amounts allocated to constitutional litigation. A not negligible proportion of the American legal community, which consists of almost one million members, is constituted today by these lawyers specialised in cause lawyering.

6. The above changes could not have occurred if the processes of 'rights revolution' had not been granted continuous support on the intellectual/cultural scene and in the world of the media arising

from it in the United States. The leading newspapers, television channels, especially on the East Coast, gave the strongest support to the fundamental rights movements, and definitely helped from first to last to discredit and force into the background the ‘conservative’ lawyers’ groups opposing them. Actually, this wide and intense media support allowed for the internal morale of universities to change, and for cause lawyering to settle at law faculties throughout the US.

7. With regard to the most ardent economic/political fights and the motives, it should be pointed out that it was the banking/financial capital that was all the time in the background of the fundamental rights movement. Even the first human rights organisation was supported by banking/financial capital from the 1910’s, but also later it was the leftist and liberal groups of the banking/financial capital opposing the industrial/agricultural capital and their conservative social groups that constituted the economic and political roots of the rights revolution. Contrary to the industrial/agricultural capitalist groups and the majority of society sharing views with them, the banking/financial capitalist groups interested in changes, and the leftist, liberal layers represented by them, attempted to gain ground through espousing the widest range of minorities. It was this that the rights revolution provided ‘human rights’ clothing for.

II The effect of fundamental rights in Germany

The starting-point was given for the rights revolution in the middle of the 1950’s just as much in Germany as in the United States. Hans Nipperdey as the President of the Federal Labour Court attained a judgment in this court, which in a labour case struck down the relevant labour law statutory provisions and used directly one of the articles of the German constitution as its basis. The theory of the direct effect of fundamental constitutional rights elaborated by him was given certain support in the legal profession in Germany, but once they had thoroughly discussed the issue of relativizing legal provisions resulting from that and the devaluation of the role of codices controlled by the law dogmatics of each branch of law, the overall majority refused this alternative. After that the Federal Constitutional Court declared the *indirect* effect of fundamental rights in one of its judgments made in 1958. Accordingly, albeit justices had to take into account the relevant fundamental constitutional rights in the interpretation of specific statutory provisions,

they were bound by the pure sense of the statutory provisions, and they were not allowed to set them aside with reference to the fundamental rights.

This indirect effect has become generally accepted in German adjudication, but actually, it plays only a secondary role beside the interpretation based on superior court precedents, or the law dogmatics literature for each branch of law. *In comparison with the American rights revolution, here the intertwining of constitutional fundamental rights into the judges' adjudication has substantially caused only minor shifts of emphasis.*

Let us look into what circumstances have protected the traditional structure of the legal system here from the rights revolution.

1. The key factor that stopped development towards the rights revolution was constituted by the German judiciary being embedded in the university jurists handling law dogmatics of the branches of law. It is especially true at the superior and Supreme Court level where personal ties with the groups of university law professors can be shown, but the socialisation of the entire German judiciary based on law dogmatics also played a part. And this is because a judge's career in Germany begins right after graduating from university, and it is subject to preliminary practice of law, and what happens at universities is handing over to and hammering the set of concepts of law dogmatics into the students. Isolation from lawyers and everyday life during a judge's career makes the judiciary more closed against social/political fights. Comparing them with the American judiciary, it can bee seen that here judges are recruited from the layer of lawyers, also university jurists, who are expectants of positions especially in superior courts and supreme courts, and simultaneously pursue lawyer's activity too. This intertwined lawyer/judicial layer is integrated into social/political organisations in numerous ways.

Therefore structurally it is the isolation of the judiciary from social/political fights that is typical in Germany, and their involvement in it that is typical in the US. This is what provides the key factor for the emergence of the rights revolution in the US, and this is what explains the rights revolution coming to a sudden stop in Germany.

2. In comparison to the US there is another difference in Germany and it is the internal homogeneity of the legal profession. Although the dimensions of the legal communities have dramatically grown also in Germany in the recent decades, and, contrasted with the formerly typical upper-middle class origin of the members of the legal profession, this has extended recruitment much more towards the lower layers of society, but the existing legal cultural patterns have been able to integrate the more heterogeneous young lawyers flooding in. That is, the internal cohesion, political homogeneity of the legal profession has been more or less preserved in spite of its radical extension, and the various differences in socialisation and origin of the young lawyers have not disintegrated the German legal profession, have not established markedly different political camps. All these make the neutrality of communication and contacts within the legal profession determinant.

3. The same political neutrality can be observed in the internal operation of university law faculties too. In spite of the differences in origin and socialisation having increased in the recent decades, university jurists have remained within the framework of politically neutral law dogmatics analyses, and *the differences in ideology and approach of various political movements have not been able to penetrate into the legal education as an alternative legal conceptual framework.* The recruits here are socialised to become lawyers not by selecting from the feminist family law, conservative family law, leftist-critical family law offer (in the same way the other branches of law could be referred to as well), but on the grounds of the basic concepts of the law dogmatics of the branches of law that remained uniform. Consequently, the neutral recruitment of lawyers have remained typical in the radically enlarged German legal profession in the recent decades from first to last, and 'movement lawyers' typical in the United States scarcely graduate from universities.

4. It is an important difference between the American and German legal scene that commitment to law dogmatics in constitutionalization has remained unharmed in Germany. Although, among the jurists of the various branches of law indignation is often caused by the justices' innovations in dogmatics in connection with their specific judgments with regard to the internal regulation of each branch of law, but the important difference in this is that it is the justices themselves who at least attempt to tie their major intrusion into the branches of law to law dogmatics revisions. On

the one hand, this has lessened the extent of the evolved deviation from the regulation in various branches of law, on the other hand, through the simultaneous further development of law dogmatics system an account can be demanded of later justices' decisions. Accordingly, there continues to be a limited possibility for making optional decisions on the grounds of political values, contrary to the American practice of constitutional jurisdiction. The commitment to the preservation of law dogmatics free of all contradictions has hindered the German constitutional review from directly undertaking the solution of social/political tensions and trying to refashion the established institutions of society based on fundamental rights.

5. The relations inside the legal profession, the judiciary and the constitutional court practice have not favoured the strategy that in the US has driven a segment of political fights from legislative struggles to the courtrooms. While in the United States various nation-wide human rights organisations have been established based on this strategy, and all the political groupings have tried to build up cause lawyering departments, for example, in the form of public policy lawyer's offices, human rights foundations, etc. and a layer of several thousands of movement lawyers have developed here, in Germany this strategy has evolved to a very low extent. As a substitution for this, reference could be rather made to the use of supranational European organisations for political purposes. Certain political groups, for example, try to attain recommendations based on human rights in the Parliamentary Assembly of the European Council which they can thereafter use as tools in fights regarding internal politics to drive legislation towards specific directions. Or, likewise, in Europe the claims filed with the European Court of Human Rights represent the realisation of political fight through human rights ideology against one's own state (that is, the governing party majority). They, however, play just an insignificant part in view of the entire scope of political fighting, which continue to be organised around debates in parliament. Political fighting through court proceedings and its cause lawyering institution system has remained vestigial in Germany.

6. No support has been given to the rights revolution in Germany by the intellectual/media sphere either. While in the United States the East Coast press, television channels have contributed the most intensively to developing the rights revolution and supporting the restructuring of existing social institutions, the sphere of the media in Germany politically more balanced and refraining

from getting involved directly in politics has not seemed willing to do that. Subsequently, apart from the brochures of minor human rights movements possibly pointing at this direction, *these demands have not been able to become an overall force to shape public opinion.*

7. A more profound explanation for the difference between the German and American sphere of the media can be given by pointing at the difference in the strategies followed by the influential capitalist groups. In Germany there is no such severe opposition between the banking/financial and the industrial/agricultural groups that in the United States has induced to undertake even civil war conditions in recent years. Subsequently, this opposition can find its solution within the boundaries of multiparty system and parliamentary fights. Here, there was simply no need to "arm minorities with human rights" in the fights between capitalist groups. As Charles Epp, an excellent analyser of the 'rights revolution', asserts, ACLU, established and for a long time exclusively financed by the banking/financial circles, commenced its operation in 1910, and from then on its activists have had a central role in attaining each Supreme Court decision, setting up new human rights organisations (see Epp 1998:4). In Germany no such development has taken place.

In summary, while in the United States, after commencement in the 1950's, several factors strengthening each other developed the constitutionalization of adjudication, in Germany after a similar starting-point the circumstances with contrary sign and their cumulative effect brought this process to a sudden stop. Owing to that, fundamental constitutional rights as a new aspect were incorporated into the German legal order only as ancillary provisions. On the contrary, in the United States exerting cathartic effects and partly smashing the internal components of the legal system it developed into a rights revolution. Its after-effects can be identified even today in the American legal system, although since the middle of the 1970's great efforts have been taken and consequently counter-tendencies have begun to make good what has been damaged by the 'rights revolution'.

Fundamental constitutional rights cannot harmonically adjust to the layers of the law unless their effect, and the constitutional jurisdiction based on them, are directed towards the legislation and

not directly towards adjudication. The comparison of the German and American legal development is instructive in this respect.